

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges injury to his low back, right shoulder and right foot<sup>1</sup> after being knocked off an oil drilling rig early on the morning of June 30, 2011. Claimant testified that he had been putting tongs on a pipe and as he was attempting to get them locked onto the pipe, the driller spun the drill and the tongs came flying at him as he was reaching around to try to grab the handles. Claimant claims he was hit in the upper body and fell backwards, past the driller, into a ream bar and over the dog house. Claimant laid on the drilling deck holding his chest testifying he was "on my butt with my back against the dog house."<sup>2</sup>

Claimant identified the crew present on the job site to include Ed, the driller, James, the chain hand, and Howland/Howie, the derrick hand.<sup>3</sup> Claimant's position on the drilling crew was as a worm hand. He testified that for a short period of time, Jay Krier the tool pusher/foreman was also on site working. Claimant reported the incident to Ed, who was also the supervisor on the job. Claimant testified that after the incident he laid in the dog house for about forty minutes to an hour trying to collect himself. Then Ed came over to him and told him that roughnecks don't lay down on the job and to get up and perform the duties or he was fired.<sup>4</sup> Claimant testified that he was forced to return to work cleaning mud out of the drill holes with his hands. Claimant claims that he asked for medical treatment and was told that if he wanted medical he should get out. Claimant had no means to leave the job site at that time so he stayed and continued to work.<sup>5</sup> The accident occurred at 2:45 a.m., and the claimant left the job site at 7:00 a.m. His work hours are 11:00 p.m. to 7:00 a.m..

Claimant had only been working for respondent since June 27, 2011, and was still learning the duties of the job when the accident occurred. He was hired off Craig's List and had no experience working on an oil rig. Claimant's first two days on this job were uneventful. Respondent had him painting a rig.

Claimant's complaints since the accident include pain in his lower back, pain in his right leg along with numbness and loss of control and shoulder problems. He is most concerned about his leg and his inability to walk properly.

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<sup>1</sup> The right foot injury occurred when his foot slipped from the mud on his boots and then a pipe fell on claimant's foot.

<sup>2</sup> P.H. Trans. at 15.

<sup>3</sup> *Id.* at 12.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> *Id.* at 16, 23.

After his conversation with Ed about the accident, claimant contacted his wife (via phone call and text message) to come and pick him up because he was not feeling well. He testified that he was sweating and starting to shake really bad and couldn't stand up properly. Claimant ended up riding home with Ed, the driller, who had transported him to the job site. Claimant testified that he tried to talk with Ed about the accident and was told to forget about it if he didn't want to lose his job. Ed then told him to get all of his stuff out of the back of the truck and that he would be called when he was needed to work again.<sup>6</sup> James and Howland/Howie were also in the truck and talked with the claimant about the accident. They both told him to keep his mouth shut because they needed their jobs.<sup>7</sup>

Claimant's wife, Jamie Wimberley, testified that she received a text message from the claimant at 2:36 a.m. informing her that he was hurt and needed her to come pick him up. But because they have three kids she asked that he go to a hotel and lay down and she would be there to get him first thing in the morning. She testified that the claimant continued to send her text messages trying to figure out how he could obtain medical treatment.<sup>8</sup> Ms. Wimberley testified that when he got home, claimant told her he injured his back, shoulder and foot at work after falling off the rig when the tongs threw him. However, the text messages between claimant and his wife are not specific regarding an accident.

She testified that when claimant arrived home on June 30, 2011, he went directly to the couch to lie down. She woke him up around 12:00 p.m. or 1:00 p.m. and told him he needed to go to the ER because he wasn't moving and kept saying that he was in pain.

After claimant got home, he placed a call to respondent's office. He spoke with Jennifer to ask for authorization to see a doctor. He was told that the company didn't have an authorized doctor and that he could go somewhere and respondent would cover it. Claimant has Healthwave through the State, but that does not cover work injuries. He chose to go to the Via Christi Regional Medical Center emergency room (ER) where x-rays were taken. Claimant advised the ER that he had been struck in the right shoulder by large tongs and a 6000 pound piece of equipment had been set on his right foot. Radiologist Timothy C. Benning M.D. read x-rays of the right shoulder as being negative. Likewise, x-rays of the right foot displayed no fractures and was read as negative.

Claimant was told there was nothing more they could do because his case was a workers compensation matter and he needed to have an assigned physician. Claimant testified that respondent provided insurance, but he was not yet qualified.

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<sup>6</sup> *Id.* at 25.

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.* at 100.

Two days later, July 2, 2011, claimant was in the emergency room again because his pain was so bad that he couldn't sleep and he was retaining fluid in his low back. Claimant was again told that he needed a workers compensation physician and was sent away. Claimant called respondent and talked with Jennifer, who again told him to find his own doctor. Claimant proceeded to go to another emergency room at the Southeast Family Medical Center, where he came under the care of radiologist Lyle W. Brooks, M.D. on July 12, 2011. An MRI was ordered and claimant was sent for physical therapy.<sup>9</sup> The MRI of the thoracic and lumbar spines were read as negative. The radiology report of July 12, 2011, indicated no spinal stenosis or nerve root encroachment at any level and no sign of an acute bony abnormality of the spinal cord.

Claimant had off work slips for June 30, 2011 through July 24, 2011 and August 16, 2011 through September 14, 2011. Claimant testified that the gap between July 24, 2011 and August 16, 2011 was a clerical error, because he was not working during that time either.

Claimant denies any prior injuries to his right shoulder, low back or lower extremities. He doesn't believe he can go back to the type of work he had been doing his whole life. He believes he might be able to do a sit down job. Before working for respondent, claimant owned a bar, which he sold. He also did construction work, rebuilding the front side of his house after a fire that caused \$54,000 in damage.

At the time of the hearing, claimant was using a cane while walking.<sup>10</sup> Claimant is not sure why all of his tests came back negative. He was told by his doctor that he needed to see a nerve specialist because an MRI only gives a flattened down version and there are going to be things that are not seen. Claimant testified that physical therapy has improved the mobility in his right leg and right arm.

A videotape of claimant was placed into evidence at the preliminary hearing. Claimant admits to trying to help move a television on August 18 or 19, 2011, but quickly found out it was too much for him. Claimant testified that he tries to do as much as he can because he is only 29 years old and wants to get back to normal.

Jay Krier has worked for the respondent for 6 1/2 years, 2 years as a driller and for the last 4 1/2 years as a tool pusher. A tool pusher is the foreman over the drillers. The drillers are the foreman over the roughnecks.<sup>11</sup>

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<sup>9</sup> All of the testing came back negative. Claimant had these visits on August 8 & 20, 2011 at NovaCare.

<sup>10</sup> P.H. Trans. at 44-45.

<sup>11</sup> *Id.* at 65.

In June 2011, Mr. Krier was supervising two oil rigs with only one in operation. Mr. Krier testified that the crew on the operating rig included Ed Rainey, the driller, the claimant, James Carson, the chain hand, and Howie, the derrick hand (he thought his real name might be Harold Holen).

Mr. Krier testified that there are 3 crews that operate a drilling rig. The first operates from 7:00 am to 3:00 pm and is called day lights tower. The second operates from 3:00 pm to 11:00 pm and is called the evening crew tower. The third works from 11:00 pm to 7:00 am is called the morning tower. Claimant worked on the morning tower.

Mr. Krier testified that on June 29, 2011, the morning crew were probably starting to drill 40 to 50 feet because there are only certain times that a tong is run.<sup>12</sup> He testified that the tongs are usually run from 11:30 p.m. to 2:45 a.m., and then cementing is done until 3:30 a.m. He testified that from 1:00 a.m. to 2:45 a.m. the crew was running surface pipe alongside the claimant. He doesn't recall any accident or injury to the claimant at that time. He does remember the claimant walking off the job. He testified that the crew was working and noticed that the claimant was not there and thought he had gone to the restroom. But he didn't come back. Then someone said that claimant had walked off.<sup>13</sup>

Mr. Krier testified that claimant's job as a worm hand is very physical manual labor and since this was claimant's first day actually drilling he figured that claimant had found the job to be too much and washed out. This is not a uncommon occurrence in this line of work. Mr. Krier opined that if the claimant was hit by the tongs, thrown backwards and flipped he would have been in his field of vision.<sup>14</sup> Mr. Krier opined that he did not leave the rig until the cementing was complete at 4:00 a.m. So, he was present when the claimant claims he was injured and he doesn't recall any incident.

Respondent placed into evidence video discs of claimant over a several hour period from August 18 to August 20, 2011, while claimant was having a yard sale. This video showed claimant, initially walking without the aid of a cane and without a noticeable limp. Later, on August 19, claimant began using the cane, although there was still no noticeable limp. Additionally, when claimant needed to load items from his house into various vehicles, he would put aside the cane, load the item, again without a noticeable limp and then pick up the cane after the item was loaded. On several occasions, claimant would pick up items in the same hand as the cane and carry both together. On one occasion he was carrying a large bag of ice in the same hand as the cane. Claimant usually used his left hand to carry the cane, but occasionally switched to the right hand. Claimant testified that he was unable to pick up his 7-8 month old daughter from the floor. Yet, on several

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<sup>12</sup> *Id.* at 72.

<sup>13</sup> *Id.* at 74.

<sup>14</sup> *Id.* at 80.

occasions on the video, he carried not only his daughter, but also her car seat out to and in from his vehicle. Claimant testified that during the yard sale he limited his lifting to small items, five pounds or less. However, he was seen aiding in the removal of a large projection television from his house and loading it into a pickup, all without apparent limitation or limp. He also aided in the transportation of several small pieces of furniture. Again, without the use of the cane and again with no noticeable limp.

By the third day of the yard sale, on August 20, claimant appeared to be limping while using the cane. However, it began to rain. As claimant was assisting to cover the materials outside in the rain, he carried a tarp in one hand and the cane in the other, again not using the cane and not limping. During the video, claimant regularly bent, stooped, and twisted, with no apparent limitation.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>15</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>16</sup>

If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.<sup>17</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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<sup>15</sup> L. 2011, Ch. 55, sec. 1, 5.

<sup>16</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>17</sup> L. 2011, Ch. 55, sec. 1.

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>18</sup>

It is claimant’s burden to prove the allegations of accident, injury and the need for medical treatment resulting from the accidental injury alleged. Here, claimant has failed to prove that he suffered an accident. The testimony of Mr. Krier directly contradicts claimant’s description of the alleged accident. The medical records contradict claimant’s contention that he suffered an injury. And, the video contradicts claimant’s testimony regarding his alleged physical limitations. The ALJ found claimant’s credibility in question. Additionally, the medical records fail to demonstrate an injury, from both diagnostic and clinical tests.

The ALJ found that claimant had failed in his burden of proving that he suffered an accident which arose out of and in the course of his employment with respondent. This Board Member agrees with that finding. The denial of benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>19</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The denial of benefits by the ALJ is affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated September 15, 2011, is affirmed.

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<sup>18</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>19</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2011.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

c:     Kenton D. Wirth, Attorney for Claimant  
       Vincent A. Burnett/Dallas L. Rakestraw, Attorneys for Resp. and its Ins. Carrier  
       Bruce E. Moore, Administrative Law Judge